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No. 92-1552

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JAIME GIRALDO and LUIS FERNANDO GIRALDO,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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ARGUMENT

1. The government concedes the lack of "a uniform standard for all circuits governing the requisite timing and explicitness of a district court's ends-of-justice findings," Brief for the United States in Opposition ["Opp. Br."] 15, yet attempts to trivialize this conflict in the circuits as a mere "housekeeping" matter that "does not directly affect the substantial rights of a defendant." Opp. Br. 15. The government itself admits, however, that petitioners' speedy trial motion might well have been granted and their convictions *reversed* in the circuits that follow a stricter standard governing the "requisite timing and explicitness" of the ends-of-justice findings than did the Ninth Circuit in this case. Opp. Br. 15.

We respectfully submit that substantial rights certainly are at stake in the resolution of a conflict in the circuits regarding the construction of a federal criminal statute that results in freedom for some and incarceration for others who are similarly situated. The resolution of precisely such a conflict in the lower courts is this Court's ultimate responsibility. *See* Rules of the Supreme Court 10.1(a), (c).

2. The proper standard governing the ends-of-justice finding is dictated, not by the varying preferences of the courts of appeals, but by the express language of the Speedy Trial Act. *See, e.g., Connecticut Nat'l Bank v. Germain*, 112 S.Ct. 1146, 117 L.Ed. 2d 391, 397 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."). The statute forbids the exclusion of delay resulting from a continuance granted by the district court unless "the judge granted such continuance on the basis of his finding that the ends of justice served by taking such action outweigh the best interests of the public and the defendants in a speedy trial." 18 U.S.C. § 3161(h)(8)(A). Congress thus plainly dictated that there would be a separate ends-of-justice finding supporting *each* continuance and that such findings would *precede* the continuances. In this case, the Ninth Circuit, with the government's endorsement, dispensed with both of those dictates, in conflict with all other circuits.

The Act secondly requires that "the court set[ ] forth, in the record of the case, either orally or in writing, its reasons for" the ends-of-justice finding. 18 U.S.C. § 3161(h)(8)(A). That provision most naturally is read to require the district court to record its ends-of-justice findings at the time it makes the findings themselves. Yet that natural reading of the text is rejected by the government and many (but not all) of the courts of appeals, including the Ninth Circuit. *See* Petition for Certiorari ("Petition") 14.

As the government points out, some of the courts of appeals have construed this second provision to permit the granting of a continuance before the making of a record of the ends-of-justice finding, as long as the court at least makes a contemporaneous statement on the record that the continuance is pursuant to the ends-of-justice exclusion under the Act. By affirming a retroactive, conclusory ends-of-justice finding even in the *absence* of such contemporaneous statements, however, the Ninth Circuit, with the government's blessing, went far beyond any prior court of appeals decision and wholly obliterated the statute's protection against the *post hoc* rationalization of delay.[1]

3. The government disingenuously suggests that retroactive ends-of-justice findings are not inconsistent with the Act as long as they reflect "implicit" findings made at the time the continuance is granted.[2] The government fails to explain how an appellate court can engage in the mind-reading necessary to discern an "implicit" finding. In truth, appellate reliance on an artifice such as "implicit" ends-of-justice findings would constitute an unjustifiable circumvention of the statute's plain requirements.

4. The government's contention that petitioners "waived" their Speedy Trial rights is equally disingenuous.

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[1] The government's brief focuses heavily on the corollary question (on which the circuits again divide) whether the district court must expressly invoke the language of the Speedy Trial Act in making the required contemporaneous statement regarding the ends of justice. Such a requirement certainly is a salutary safeguard against abuse of an exclusion that Congress intended to be of limited application, but it by no means is a sufficient check.

[2] Opp. Br. 13. The sole basis for the government's assertion that the court made such "implicit" findings in this case is a single passing reference to the Act by the district court at the time of the first continuance. *Id.* at 13. The government cannot seriously maintain that such a remark satisfies the Act's requirement of a contemporaneous finding accompanying *each* continuance granted thereafter — particularly with respect to the numerous continuances that occurred simply by default. *See* Petition 3-4.

Congress made clear that those rights are not waivable, and no court has held otherwise.[3] Nor, contrary to the government's contention, does this case present "egregious" facts warranting the acceptance of an unprecedented waiver doctrine. Opp. Br. 16. While some continuances certainly occurred because of defense counsel's conflicting trial schedule, the government does not dispute that many others — totalling over 19 months — resulted solely from neglect of the case by the district court and prosecutor.[4] During that time, trial dates came and went with no indication on the record that the district court was even conscious of them. The government also does not dispute the prejudice to petitioners resulting from these delays. *See* Petition 12. This Court should make clear to the lower courts that such prejudicial delay cannot be swept under the rug by conjuring up

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[3] *See* Petition 12 & n.16. The cases cited by the government at Opp. Br. 16 n.8 provide no support for its position. None accepts a waiver doctrine; indeed, all confirm the *nonwaivability* of Speedy Trial Act rights. Several of the cases (*Pringle*, *Eakes*, *Bowers*, and *Kucik*) hold that, while not legally effective, an attempted prospective waiver of Speedy Trial limits or a stipulation by the parties to exclude subsequent delay for Speedy Trial purposes may result in the legitimate exclusion of delay resulting from the parties' mistaken assumption of the effectiveness of such actions. The *Kington* case questions even that type of exclusion, but in any event, no such facts obtain in this case. *Noone* did not involve a waiver issue, but rather the exclusion of delay resulting from the defendant's own procrastination in obtaining counsel, a circumstance again not presented here.

[4] The government's lengthy recitation of the facts only confirms the two periods of inactivity and four default continuances discussed at Petition 3-4. The government does not dispute that at least one continuance (November 30, 1987) was requested by the *government* for its convenience. Even as to the continuances requested by defense counsel, the government's waiver argument relies on the unwarranted assumption made by the district court, without conducting any inquiry, that petitioners — two non-English speaking accuseds — understood their Speedy Trial Act rights and deliberately chose not to press for a trial.

"implicit" ends-of-justice findings or invoking a spurious waiver doctrine. [5]

Respectfully submitted,

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[5] Equally spurious is the suggestion that the Speedy Trial Act clock was tolled by the alleged pendency of a motion *of which the court itself was not even aware*. Opp. Br. 5. Contrary to the government's assertion, the district court did *not* decide that an evidentiary hearing on petitioners' prosecutorial misconduct motion was warranted. The record shows only that, after the government filed its response opposing such a hearing, the court did *not* schedule one. (The March 16, 1989 date to which the government refers, Opp. Br. 4, was merely a "date for appearing," *i.e.*, a status call. Tr. Feb. 22, 1988, at 19.) Nor is the government correct in its suggestion that a hearing on the motion was deferred because of the *Minkow* case. Opp. Br. 4-5 & nn. 3-4. The *Minkow* trial did not commence until six months later, in late August 1989. *See* Reply Brief of Defendants-Appellants, *United States v. Giraldo*, Nos. 90-50415, 90-50420, Appendix A, at A-5 (docket sheet in *Minkow*). The district court's retroactive finding on this point was clearly error — an error easy to make when attempting retroactively to justify lengthy delays with a single determination of excludability.